Supreme Court, U. S.
FILED
NOV 15 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-544

BLUE CROSS OF WESTERN PENNSYLVANIA,
a non-profit Corporation,
Petitioner

v.

HONORABLE RABE F. MARSH,
United States District Judge,
Nominal Respondent
(ALMA COLES, an individual),
Real Party In Interest-Respondent

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. Proceedings in the District Court

On August 27, 1976 Respondent Alma Coles filed in the United States District Court for the Western District of Pennsylvania a complaint for injunctive relief, back pay, and damages which was captioned, "Alma Coles v. Blue Cross of Western Pennsylvania, Civil Action No. 76-1097. The complaint alleged discriminatory employment practices in violation of 42 U.S.C. §2000e, Title VII of the Civil Rights Act of 1964 as amended. The action was sought to be maintained as a Class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of plaintiff and an unspecified number of persons.

Respondent's counsel engaged in extensive and difficult investigation to prepare and present motions, counter-motions, answers, interrogatories and depositions. Blue Cross was uncooperative and evasive, with the district court's sanctions, in responding to Respondent's discovery efforts.

On December 17, 1976 plaintiff and plaintiff's counsel (now Respondent and Respondent's Counsel) were forbidden during the investigation and preparation of this case; from communicating "directly or indirectly, orally or in writing," with any* members of the Class (actual or potential), several named individuals and organizations and anyone with a propensity to dispose themselves concerning this case. The prohibition on communications, in this case, resulted from the invoking of Rules 83 and 23 of the Federal Rules of Civil Procedure, not unlike those in Rodgers v. United States Steel, 508 F.2d 152 (1975 3rd Cir.) cert denied, 423 U.S. 832 (1975).

* emphasis added

The ability of respondent's attorney to adequately proceed with the investigation and preparation of the case was sharply curtailed by the Order of Court prohibiting communications.

On January 27, 1977 respondent's attorney filed a motion in the district court requesting that a Class determination hearing be postponed until discovery could be completed and reviewed. The district court denied plaintiff's motion and had a hearing on February 3, 1977.

On February 3, 1977, the district court orally set trial for February 4, 1977. This Order was subsequently changed to February 23, 1977 after the Court was informed of respondent's illness and that an appeal was being undertaken to the United States Court of Appeals for the Third Circuit because of the severe prejudice resulting to plaintiff as a result of the Order of Court prohibiting communications and the Court's denial of plaintiff's request for extension of time to make discovery.

II. Proceedings in the Court of Appeals

After filing of briefs and oral argument, the United States Court of Appeals, on July 28, 1977, issued a Writ of Mandamus directing the district court to vacate the Protective Order citing as reasons therefore:

1) Rule 83 does not empower the district court to prohibit communications at a time prior to the Class determination for the purpose of preventing the recruitment of additional parties by the plaintiff or of the solicitation of financial or other support to maintain the action ___F.2d___ (Petitioner's Writ Appendix C, p. 12a).

2) To the extent that the district court is empowered under Rule 83 to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened ___F.2d___ (Petitioner's Writ Appendix C, p.12a).

3) The district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23, ___F.2d___, Petitioner's Writ, Appendix C, p. 12 and 13a.

Reasons For Denying The Writ

I. THERE IS NO REAL CONFLICT OF DECISIONS OF THE COURT OF APPEALS

The decision of Chief Justice Seitz fosters the purposes of Rule 23 by labeling the conduct of respondent as encouraging common participation in the litigation of her sex/race discrimination claim and went on to say, "The activities were not abuses of the Class Action device...." ___F.2d___ (Petitioner's Writ, Appendix C, p. 11a. Chief Justice Friendly also sought to foster communication in Weight Watchers of Philadelphia v. Weight Watchers International 455 F.2d 770 in approving negotiations with potential Class members who are of a mind to reach a settlement prior to Class certification. It is only the settlement of the Class Action itself without Court approval that violates Federal Rules of Civil Procedure 23(e).

However, it may be a mischaracterization of the dicta in the Weight Watchers opinion to say it stood for anything other than the ruling of Judge Bruchhausen, was not appealable and would not be appropriate for mandamus. For Petitioner here to ascertain that Chief Judge Friendly's Opinion stood for more is without basis.

II. THE DISTRICT COURT'S RULING VIOLATES THE FIRST AMENDMENT

The December 17, 1976 Order of Court was an prior restraint of free speech, moreover, the Order flatly and broadly prohibited all communications and associational activities, however lawful or innocuous as between respondent and persons as set forth in the District Court's Order of December 17, 1976. Any prior restraints on communications have been held by the Supreme Court, Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) at 419 to carry, "a heavy presumption against its constitutional validity" and the court has "a heavy burden of showing a justification" therefore. The district court put forth no justification for the prior restraint imposed in this case. The Supreme Court has maintained the established principle that prior restraints on First Amendment Rights are justified only where there exists "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." Craig v. Harney, 331 U.S. 252 (1941) at 376.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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